No. 82-1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE INTERIOR, *ET AL.*

Petitioners,

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *ET AL.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the government had failed to show how its legitimate and substantial interests were served by prohibiting homeless demonstrators from sleeping on park land when (a) the demonstrators were issued a permit that allowed them to erect tents, to maintain a 24-hour-a-day presence in and around the tents, and to lie down and feign sleep inside the tents, (b) homeless people who were not participating in a demonstration were not prevented from sleeping in the same parks, and (c) other demonstrators had recently been granted a permit to sleep in one of the same parks.

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STATEMENT

1. Respondent Community for Creative Non-Violence ("CCNV") is a religious association that supplies food, shelter, and other assistance to poor and homeless persons. The individual respondents include members of CCNV and several individual homeless persons.

2. During the winter of 1981-82, CCNV organized a demonstration in one quadrant of Lafayette Park in which homeless people spent the night -- awake and asleep -- to dramatize the seriousness of their plight and to convey to the government and the public the fact that they were without homes or shelter.[1/] The demonstration was

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1/ The demonstration was permitted by court order. See Community for Creative Non-Violence v. Watt, 670 F.2d 1213 (D.C. Cir. 1982). The Court of Appeals determined:

[Footnote continued on next page]

peaceful and orderly, and resulted in no damage to park property and no interference with the ability of others to use Lafayette Park in the winter.[2/]

3. In 1982, CCNV requested permission to conduct a virtually identical demonstration in Lafayette

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[Footnote continued from previous page]

> [A]s the District Court found, in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go.... Indeed, the uncontroverted evidence in this case is that the purpose of the symbolic campsite in Lafayette Park is "primarily" to express the protestors' message and not to serve as a temporary solution to the problems of homeless persons. Thus, the only activity at issue here -- sleeping in already erected symbolic tents -- cannot be considered "camping."

Id. at 1216-17 (footnotes omitted). The Park Service did not seek review of that decision in this Court.

2/ See, e.g., Declarations of Gabriel Leanza, William Perkins, William Peters at RD 19.

Park and on one section of the Mall during the winter of 1982-83.[3/] Pursuant to its regulations, the Park Service granted permission for CCNV and the homeless demonstrators to erect tents and to maintain a 24-hour-a-day presence at the demonstration sites.[4/] Although permitting the demonstrators to sit and lie down on blankets in and around the tents, and to even feign sleep, the Park Service forbade the demonstrators from actually falling asleep. The Park Service claimed that any actual sleeping activity would convert the demonstration into prohibited "camping."

Thus, the only difference between the demonstration that petitioners

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3/ Exhibit A to Complaint at RD 1.

4/ Exhibit C to Complaint at RD 1.

are willing to permit and the demonstration that they contend may be punished as a crime (see 36 C.F.R. §50.5(a)) is the difference between the demonstrators' ability to feign sleep as opposed to actually falling asleep.[5/]

4. It is also the case that the Park Service does not seek to prohibit all sleeping in Lafayette Park or on the Mall. The regulations permit casual sleeping or napping in both parks during the day or night, see 47 Fed. Reg. 24,299, 24,301 (June 4, 1982); 36 C.F.R. §50.25(k); see plurality opinion at 6a. The Park Service also

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5/ Although the difference between feigned sleep and actual sleep has no practical significance to the Park Service, it is of crucial importance to the homeless demonstrators, because unless they are allowed to sleep, they will be unable to demonstrate. See, e.g., Declaration of Clarence West at RD 2; declaration of James Wilson at RD 5.

does not prevent individual homeless people, not engaged in demonstration activity, from regularly sleeping overnight in these parks.[6/]

The Park Service has even permitted other demonstrators to sleep on the Mall. In May, 1982, participants in a Vietnam veterans' demonstration were specifically authorized by the Park Service to sleep as part of their demonstration.[7/] Both the plurality and the dissenting judges in the court of appeals agreed that the only distinction between their demonstration, which the Park Service did not label

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6/ See, e.g., Declarations of Mitch Snyder, Mary Ellen Hombs, Carol Fennelly at RD 5.

7/ Exhibits 1a-1d to plaintiffs' summary judgment motion at RD 5.

"camping," and the proposed CCNV demonstration, which was proscribed as unlawful "camping," was that the veterans -- whose demonstration was held in warm weather -- did not occupy their tents but slept in the open air. See plurality opinion at 7a; opinion of Wilkey, J., dissenting, at 55a n.19.

5. It is against this factual background that the court of appeals issued a one-sentence per curiam decision allowing the demonstration to proceed. As the plurality of the judges concluded, "the government has failed to show how the prohibition of sleep, in the context of round-the-clock demonstrations for which permits have already been granted, furthers any of its legitimate interests." Plurality opinion at 3a.

REASONS FOR NOT GRANTING THE PETITION

I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW.

1. An examination of the facts of this case reveals that the dispute between the parties involves a factual difference so narrow as not to merit review. Both parties are in full agreement that the proposed demonstration may involve:

> (a) the erection of tents in Lafayette Park and on the Mall, pursuant to a limited-term renewable permit, as part of a demonstration designed to symbolize and dramatize the existence and plight of homeless people;
>
> (b) the presence in and about the tents of homeless persons on a round-the-clock basis to dramatize the fact that human beings are attempting to subsist in the winter without shelter; and
>
> (c) the assumption by the demonstrators of postures of sleep in the tents to dramatize the fact that human beings are actually sleeping out-of-doors in the dead of winter.

The parties are also in full agreement that the proposed demonstration may not involve:

(a) the preparation or serving of food;

(b) the building of any fires;

(c) the erection of any permanent structures;

(d) the breaking of the earth; or

(e) the storage of personal belongings.

In fact, the only point in controversy is whether these demonstrators, while lawfully assuming the posture of sleep during their round-the-clock vigil, may actually fall asleep.

This case simply does not involve the legal issues presented in the petition for certiorari. The only question decided below and presented here for review is whether the Park

Service properly applied its "no camping" regulations to prohibit sleeping in the context of this demonstration. As petitioners recognize, the court of appeals upheld these regulations on their face. Petition for Certiorari at 7 (hereinafter "Petition"). The court merely determined that the Park Service had improperly applied the regulations in the context of this demonstration.

The Park Service has never advanced any substantial governmental interest in prohibiting respondents from actually sleeping as opposed to merely feigning sleep. Rather, it has argued, the government has a significant interest in preventing camping in Lafayette Park or on the Mall. Petition at 13-14. Neither the respondents nor the court of

appeals has denied the legitimacy or significance of that interest. However, neither camping nor the government's interest in preventing it is at issue in this case.8/

8/ The Park Service may continue to apply its regulations prohibiting camping by any and all groups, demonstrating or nondemonstrating. See 36 C.F.R. §§50.19(e)(8) and 50.27(a). Moreover, other provisions of Park Service regulations ensure that no demonstrators or other persons may damage park resources or deprive others of their use. See, e.g., 36 C.F.R. §§50.7 - 50.18, 50.24 - 50.35, 50.39 - 50.45, 50.50 - 50.52. These regulations prohibit the following activities in the parks, inter alia: damaging statues, drinking fountains, plumbing, lawns, and any other park facilities; dumping, storing any materials, or spilling; picnicking in undesignated areas; gambling; soliciting or sales without a permit; committing a nuisance or engaging in disorderly conduct; unauthorized bathing; use of audio devices; lying on park benches; use of liquor; and obstructing entrances, exits, or sidewalks.

2. Petitioners have attempted to broaden the issues presented for review by complaining about earlier decisions by the District of Columbia Circuit.

It is true that those cases may have involved important First Amendment issues.[9/] But those issues are not presented in this case, since the government chose not to raise them

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9/ Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972), held that demonstrators had a right to erect temporary structures on park land so long as the government permitted other groups to erect structures at the same location. That case was ultimately settled with the promulgation of Park Service regulations permitting the erection of temporary structures in connection with demonstrations and special events. 36 C.F.R. §§50.19(e)(8) and 50.27(a). United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976), reversed the conviction of a demonstrator simply because the regulation under which he was convicted afforded "totally unfettered discretion" to enforcement personnel. Id. at 986.

either by denying CCNV's application for a permit in any respect other than sleeping, or even by putting those issues before the lower courts. Thus, there is no record of any kind upon which an informed review of those issues could be based; as the Court has noted, "[q]uestions not raised below are those on which the record is likely to be inadequate, since it certainly was not compiled with those questions in mind." Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).10/

10/ Just last month, the Court called attention to the "weighty prudential considerations" that militate against the determination of "difficult issues of great public importance" in cases where those issues are not squarely raised below and brought up for review. Illinois v. Gates, No. 81-430 slip op. at 8-9 (June 8, 1983). As in that case, the Court should here decline to address broad issues of constitutional law unnecessary to the decision below -- indeed uninvolved in the case and controversy between the parties.

Moreover, it is not the D.C. Circuit's decisions that "forced" the Park Service to grant CCNV's permit application. Rather, it is the Park Service's own regulations, which permit, inter alia, the erection of temporary structures and a 24-hour presence. See 36 C.F.R. §50.19(e)(8) and (e)(6).11/ These regulations simply provide demonstrators with rights or privileges equal

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11/ Park Service regulations permit the erection of "temporary structures" on park land in connection with demonstrations and special events of all kinds. See 36 C.F.R. §50.19(e)(8). Such structures are frequently erected. For example, on the Fourth of July, 1983, large, covered stages were erected on the Washington Monument grounds and on the Mall for concerts by Wayne Newton and the National Symphony Orchestra, respectively. See The Washington Post, July 5, 1983 at C-1.

to those that the Park Service has long extended to others. For example, for a period of several weeks each winter the Christmas Pageant of Peace is permitted to erect numerous structures, in addition to burning a Yule log and maintaining a group of reindeer on the Ellipse. See Women Strike for Peace v. Morton, 472 F.2d 1273, 1302 (D.C. Cir. 1972) (Wright, J., and Leventhal, J., concurring). If "the government does not agree" (Petition at 14 n.10) with the provisions of its own regulations, it can amend or revoke them in the ordinary way, without this Court's assistance.

3. Nor does the court of appeals' decision conflict with Morton v. Quaker Action Group, 402 U.S. 926 (1971), as petitioners assert. Petition at 10-11. Morton was not a decision on the merits

and is not to be construed as having "the same precedential value as an opinion of this Court treating the questions on the merits." Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); see Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981).[12/]

12/ This Court's order in Morton summarily vacated, without explanation, an equally summary action by the court of appeals. 402 U.S. at 926. The entire proceedings in this Court, from the initial filing of the Solicitor General's application for a stay to the issuance of the Court's order, spanned less than twenty-four hours. Id. The unexplicated summary vacation of a summary modification of a preliminary injunction (which is all Morton comprises) is clearly not a decision on the merits. Nor is it the type of "decision of this Court" which Rule 17.1(c) contemplates as a basis for the exercise of certiorari jurisdiction.

Thus, the only question before the Court on this petition is whether the difference to the government between feigned and actual sleep by a group of demonstrators is sufficient to warrant this Court's plenary review. Especially in light of the extraordinary demands upon this Court's resources, the answer is no.

II. THE COURT OF APPEALS DECISION IS CORRECT.

The court of appeals conscientiously applied the standards enunciated in this Court's First Amendment cases, properly balancing the demonstrators' interests in sleeping as part of their demonstration against the government's purported interest in prohibiting that activity.

1. Petitioners' analysis of this case proceeds from their assertion that

the "primary uses" of Lafayette Park and the Mall are the "enjoy[ment] of nature" and "serenity." Petition at 3-4, 9. Petitioners nowhere explain how respondents' sleeping, which will take place at night and in the winter, when the parks are generally empty, will interfere with anyone's "enjoyment of nature."[13/] But even assuming arguendo that some interference would occur, such interference cannot provide a basis for prohibiting a demonstration in these parks. As the Court reminded

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13/ Nor are petitioners correct in suggesting that permitting sleeping as part of a demonstration would interfere with others' use of the parks. Petition at 10. Demonstrators are permitted to use park space on a first-come, first-served, limited-term basis. See 36 C.F.R. §50.19(b) and (e)(5). No additional park space will be used if a demonstration involves sleeping as opposed to a wakeful presence.

the government earlier this Term, "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums'." United States v. Grace, No. 81-1863 slip op. at 5 (April 20, 1983) (emphasis added).[14/] In view of the regular government-sponsored use of these parks for festivals and public events,[15/] as

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14/ As the court of appeals noted, different areas may be subject to differing restrictions. Plurality opinion at 28a n.35. The Park Service's existing regulations, for example, prohibit demonstrations on the grounds of the Lincoln, Jefferson, and Vietnam Veterans memorials. See 36 C.F.R. §50.19(c)(2).

15/ See, e.g., 36 C.F.R. §50.19(d)(1) (reserving park areas for official events including the Christmas Pageant of Peace, the Fourth of July Celebration, the Festival of American Folklife, etc.).

well as their availability and constant use for privately-sponsored events,[16/] petitioners' purported concern for these demonstrators' interference with the serenity and "enjoyment of nature" in the parks is hardly credible and certainly not sufficient to prohibit respondents' proposed demonstration.

2. Furthermore, in adjudicating the issue of "symbolic speech," the court of appeals majority faithfully followed the decisions of this Court in Spence v. Washington, 418 U.S. 405 (1974), and United States v. O'Brien, 391 U.S. 367 (1968).

In Spence, this Court held that, for symbolic conduct to be considered

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16/ E.g., the Papal Mass held on the Mall on October 7, 1979, which attracted a congregation numbering hundreds of thousands. See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (refusing to enjoin the celebration of the Mass).

"speech," it must involve "[a]n intent to convey a particularized message ... and in the surrounding circumstances [a] likelihood ... that the message would be understood by those who viewed it." 418 U.S. at 410-11. Both of these criteria are clearly present here. As Judge Edwards observed,

> A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.

Opinion of Edwards, J., concurring, at 33a. See plurality opinion at 14a-15a.

Further, the four-part test articulated in O'Brien assures that "symbolic speech" need not be permitted if it would interfere with a substantial government interest unrelated to

the suppression of free expression. 391 U.S. at 377. The court of appeals applied the O'Brien test to the sleeping at issue here, and the majority concluded that no legitimate government interest would be served by permitting demonstrators to spend the night in tents in Lafayette Park and on the Mall in feigned postures of sleep, but arresting them if they dared to fall asleep. See plurality opinion at 20a-25a; opinion of Edwards, J. at 32a-38a; opinion of Ginsburg, J. at 48a.

Contrary to the government's assertion, respondents do not claim that they or anyone has "an absolute right to deliver a message in the precise manner thought by the demonstrator to be maximally effective." Petition at 14-15. Nor was the court

of appeals' decision based on any such proposition. The court of appeals simply held the government to the O'Brien requirement of showing how the regulation at issue, as applied to the proposed demonstration, served a significant governmental interest. No such showing was made below, and none is suggested in the petition for certiorari.16/

16/ Petitioners have advanced several specious arguments in support of their petition for certiorari. They have claimed that they will be unable to distinguish between sleeping as part of a demonstration and camping in the parks. Petition at 10. However, petitioners were able to make precisely such a distinction when they determined that sleeping as part of a veterans' demonstration was not camping, and therefore not prohibited. See, ante pp. 5-6.

Moreover, petitioners' claim that they must now permit any and all persons to camp in Lafayette Park (Petition at 10) is simply unfounded. Neither respondents nor any judge below has ever hinted at such an obligation. There will be time enough to deal with the hypothetical problem of a group advancing a

[Footnote continued on next page]

In sum, the court of appeals properly held that the difference between feigned and actual sleep did not implicate any substantial governmental interests. It is precisely this lack

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[Footnote continued from previous page]

pretextual First Amendment justification for sleeping (id. at n.6) if and when such a group appears. No party or judge in this case has ever suggested that CCNV's First Amendment claims are anything but bona fide.

Petitioners suggest that the court of appeals erred by analyzing only the government's interest "in not making an exception [to the regulation] in the particular case at hand." Petition at 14. This characterization of the court's action is inaccurate. The court did not conclude that the regulation was valid but that the government could afford to make one exception. Rather, it held the regulation unconstitutional as applied to respondents' conduct. Surely the government does not mean to suggest that a court can never hold a facially valid regulation unconstitutional as applied to particular conduct. See United States v. Grace, No. 81-1863 (April 20, 1983).

of any governmental interests that renders the government's refusal to grant permission to these demonstrators unlawful. Once the Park Service agreed to the erection of tents and their occupancy by persons feigning sleep around-the-clock, it can hardly argue that a serious interest is compromised by permitting sleep itself. Accordingly, the Park Service's obdurate refusal to permit respondents to sleep was wholly arbitrary and the judgment of the court of appeals was correct.

CONCLUSION

The petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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EDITOR'S NOTE

The following motion of respondents for leave to file a supplemental joint appendix was denied by the Court on December 12, 1983 (52 LW 3460). It is reproduced here for completeness.